SUPREME COURT, U. S.
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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II,

MERRITT W. GREEN II,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To The Supreme Court of Ohio.

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To The Supreme Court of Ohio.

Petitioner herein, Merritt W. Green II, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered on May 17, 1961.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported in 172 Ohio State, at page 269. It is reported unofficially in the May 22, 1961, issue of the Ohio Bar. The opinion of the Ohio Court of Appeals is unreported but can be found at 47 L. R. R. M. at page 2230. Both opinions are printed in the Appendix hereto.

STATEMENT OF JURISDICTION.

The judgment of the Supreme Court of Ohio was entered as of May 17, 1961. There was no motion for a rehearing.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3), inasmuch as the Ohio courts have denied the petitioner rights and privileges under federal

statutes specially set up and claimed and have also denied rights and claims of the petitioner guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED.

Is an attorney denied due process of law when he is convicted of contempt of court for proffering good faith advice to his clients that a violation of an ex parte temporary injunction provided a means of testing the jurisdiction of the State court over the subject matter?

Is a lawyer who in good faith advises his client that a state court was without jurisdiction to issue an ex parte injunction prohibiting peaceful picketing by employees at the premises of an employer engaged in interstate commerce, denied due process of law and equal protection of the laws by the refusal of the trial court to grant him a trial or permit him to give testimony, call witnesses, or otherwise answer a written charge of *indirect* contempt lodged against him *by the state court Judge* for giving such advice?

May a state court circumvent the supremacy clause of the federal constitution by the device of issuing an ex parte temporary injunction in a labor dispute affecting interstate commerce preventing a labor organization from engaging in activities protected by the Labor-Management Relations Act and then summarily refusing to set or hold a hearing on the question of the jurisdiction of the court over the subject matter of the action and punishing the union's lawyer for advising his client that the court acted beyond its jurisdiction in granting the injunction?

May a state court issue an ex parte temporary injunction prohibiting peaceful picketing in a labor dispute affecting interstate commerce solely on the basis of a petition which does not allege acts of violence or conduct likely

to produce violence, mass picketing, threats, intimidation, any kind of disorder or breach of the peace arising from the picketing of the employer's premises, but alleges only a conclusion that to permit picketing to continue "will result in danger to life and limb of the employees of the plaintiff's company and irreparable loss and damage to property of the plaintiff's company and that the plaintiff has no adequate remedy at law"?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The constitutional provisions involved are that portion of Section 1 of the 14th Amendment to the Constitution of the United States which reads as follows:

> "* * *; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And that portion of Article VI of the United States Constitution which reads as follows:

> "* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in Constitution or Laws of any State to the Contrary notwithstanding."

The statutory provisions involved in this case are those contained in Sections 7 and 8 (157 and 158) of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. 141 *et seq.*, and that portion of Section 10 (a) (160) of the Act which reads as follows:

> "The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *"

Sections 2705.02, 2705.03, 2705.05, 2727.03 and 2727.06 of the Revised Code of Ohio, as they pertain to this case are set out in the Appendix.

STATEMENT OF THE CASE.

The petitioner is a young Toledo lawyer, a member of the Bar of Ohio. He was cited for an indirect contempt of court and was sentenced to a term in jail and to pay a fine without being afforded a hearing or trial.

The charges of contempt arose out of the petitioner advising the regional counsel of a labor union that an ex parte temporary injunction issued by a Judge of the Court of Common Pleas of Lucas County, Ohio, was, in his opinion, a nullity for the reason that the state court did not have jurisdiction over the subject matter of the action and that, in view of the adamant refusal of the issuing court to grant a hearing, the order could be tested quickly on an application to a higher court for a writ of habeas corpus if picketing continued and the pickets were held in contempt by reason thereof.

The initial issue raised by this petition is, we believe, one of first impression here in this context. It is of critical importance to the members of the legal profession in the United States as well as their clients. It concerns the right and obligation of lawyers to give, and their clients to receive, full and mature advice in the critical area of labor-management relations and elsewhere.

This petition also addresses itself to the never ending vigilance required to safeguard the requisites of due process and specifically to the right of a lawyer to have

the minimal standards of a fair hearing when cited for indirect contempt for having given his clients honest, even if erroneous, advice.

This case is of vital importance insofar as it affects the national labor relations policy because the Ohio courts have sanctioned the use of the ex parte state court injunction to ban peaceful picketing without reference to the interstate character of the dispute or the jurisdiction of the court over the subject matter. This they have done by labeling the temporary injunction a status quo order which somehow becomes and remains a valid order until the issuing court has the inclination or the time to determine whether it had jurisdiction over the subject matter in the first instance.

This theory of the Ohio court permits the wholesale circumvention of the supremacy clause of the United States Constitution where interstate labor matters are involved and will greatly weaken the uniform administration of our national labor policy.

Also involved is the crucial question whether the preemption doctrine which has been thoroughly defined by this Court can be wiped out by a state court assuming jurisdiction over a labor dispute between an interstate employer and his employees by the simple device of vaguely suggesting in a petition for injunction that danger and loss *could* result if picketing is not prohibited, *without supporting such a conclusion by any facts.*

These background facts are pertinent:

Friday, May 27, 1960, was the Friday before the Memorial Day holiday, which fell on Monday.

That morning the petitioner was retained by the International Longshoremen's Association, a labor organization having its regional headquarters in Chicago, to represent the local union in Toledo (R. 43). Its members were in-

volved in a labor dispute with the Toledo Marine Terminal, Inc. The members, employees of the Terminal Company, were then engaged in peaceful picketing of the premises of the employer (R. 22).

It is admitted by everyone that the employer was engaged in interstate commerce and that the picketing by the union members was in all respects orderly and peaceful (R. 3, 6).[1]

Upon being retained, the petitioner contacted counsel for the Toledo Marine Terminal, Inc. to advise him that he was representing the union (R. 44).

That afternoon the petitioner was notified, *not by counsel* but by the court clerk's office, that an action for injunction had been filed and had been assigned to Judge McCabe. The petitioner immediately talked to Judge McCabe by phone. He informed Judge McCabe that he represented the union and that if a request was made for an immediate injunction, he would be available for a hearing upon a moment's notice and requested to be called in such an event. He was assured that he would be called if such a request was made (R. 45 and 46).

He waited in his office for such a call. *None came from the Judge or from opposing counsel.* Instead, he learned later from a call by a courthouse employee that a temporary injunction had been granted (R. 46).

Upon hearing of this unexpected, if not strange, turn of events, the petitioner and his associate met with the

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[1] Judge Younger at the start of his Ohio Court of Appeals dissenting opinion said (App. p. 47, infra):

> "It is admitted by all parties here that the plaintiff in the case in which this contempt proceeding arises, The Toledo Marine Terminal, Inc., is engaged in interstate commerce and that the picketing by the defendant members of the International Longshoremen's Association was entirely peaceful and non-violent."

court in chambers. This is what then took place (Record, starting at page 46):

> "* * * I told him I would like to have a hearing on the issuance of the restraining order. *He said definitely and flatly that I was not going to have a hearing*, that Mr. Ragan had told him that everyone was happy with the contract and that some hoodlum from Detroit had come to Toledo and forced them to go back on strike and he wasn't going to let these outsiders come down here and push us around. *I protested that these were not the facts* and that the position of the union was that the persons who signed the agreement had no authority to do so *and further suggested that the court had no jurisdiction. He again said that I was not going to get a hearing on the matter and that he would make a little jurisdiction.*
>
> *"I told him that I was entitled to an immediate hearing on the matter particularly in view of the question of jurisdiction and he replied that he did not have time and that I would have to wait my turn."*

The Judge was informed that the petition had not prayed for a restraining order pending a hearing on a temporary injunction[2] but had prayed for only a temporary injunction and that he had issued a temporary injunction.[3] In reply to this the Judge said (R. 47):

> "He replied that he did not read the petition very carefully and could not really say what it was all about

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[2] Under Ohio law (Section 2727.06 R. C.) restraining orders are permissible only when a court sets a motion for a temporary injunction for hearing, in which event a restraining order may issue pending the hearing of the temporary injunction. Here no such hearing was set.

[3] Throughout the proceedings the court considered the order as a temporary injunction. At page 20 of the Record the court said "* * *, this Court granted the temporary injunction." At page 31 of the Record: The Court: "Well, we will take first things first. First, of course, will be the violation of the temporary injunction."

but felt that he could take Mr. Ragan's word for the contents and again said that he did not have time to set the matter down for hearing, either now or in the future."

Had the court examined the petition filed by the employer (R. 10) instead of relying on statements of counsel before issuing the ex parte injunction, or had the court honored the assurance given the petitioner that he would be notified if a temporary order was requested or observed the Canons of Judicial Ethics relating to the issuance of ex parte injunctions,[4] the court would have learned not only that there *was not* in existence a completed contract (R. 18), but that interstate commerce was involved (R. 3); that peaceful picketing was in progress; that a labor dispute was then in existence and negotiations for settlement were in progress (R. 4); and that an unfair labor practice had been filed with the National Labor Relations Board charging the employer with refusal to bargain in good faith (R. 4, 23).

Instead of resorting to Detroit hoodlums to make a little jurisdiction the court would have been able to discern that the conduct sought to be enjoined was arguably or potentially subject to the Labor-Management Relations Act of 1947 as amended.

The Judge absolutely refused permission for another Judge to hear the matter (R. 48). (In Lucas County when a case is filed it is assigned to a Judge and stays with that Judge for determination of all matters from the beginning to the end of the lawsuit.) He did (R. 49), after a great deal of urging, agree to have Mr. Ragan, attorney for the plaintiff, appear that afternoon for a hearing on the question of the court's jurisdiction. The Judge assured the

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[4] Canon 16: Ex parte applications.

petitioner that he would contact him as soon as Mr. Ragan was contacted.

Again not hearing from the Judge, the petitioner called him at 4:00 o'clock that afternoon. This is what took place (R. 49):

> "Judge McCabe said that he had contacted Mr. Ragan but that he was about to leave and did not intend to hold night court. I requested that he hear the matter on Saturday and he stated that he would not be in over the weekend. I requested a hearing on Tuesday (Monday being a holiday) but he declared that he had a trial on that day and further said that it looked like the rest of his week was filled."

Convinced that Judge McCabe had no intention of granting a hearing, the petitioner and his associate consulted the authorities and concluded that an order made by a court in a matter over which it had no jurisdiction is void and contempt could not be predicated thereon. On the basis of this conclusion the petitioner called Mr. Friedman, regional counsel for the international union in Chicago where negotiations were then being conducted, and advised him of the status of the matter (R. 50):

> "I explained to him that though it was possible to file a motion to vacate or demurrer to the petition that it was apparent from the actions of the court that such a motion would not be set down for hearing in the near future and that even if it were, an adverse ruling, which seemed most likely in view of the court's attitude, would not be a final order and could not be appealed.[5] I then told him that if we were correct on the law that the order of the court was wholly invalid, then the only alternative would be to defy the order of the court in the hope that Mr. Ragan would file contempt proceedings which undoubtedly would be heard

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[5] Temporary orders are not appealable in Ohio.

immediately and from which we could instantly appeal to the Court of Appeals to determine the jurisdiction of the court.

"Mr. Friedman said that he would have to take the matter up with the officials of the union and that he would contact me later in the evening * * *."

"At about 8:00 P. M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had concluded that on the basis of my report to them that their only possible course was to continue to picket. I thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets."

The above quoted portions of the record are part of the unrefuted testimony of the lawyer before the Court of Appeals at his hearing for a writ of habeas corpus (R. 43-54). It is obvious from the record that the alleged acts of contempt on the part of the lawyer-petitioner were confined to those at 4:00 o'clock Friday afternoon when he talked by phone with the union's counsel in Chicago.

Upon the instructions of the union officials some peaceful picketing continued at the premises. As a result, the employer filed an affidavit of contempt on May 31, 1960, naming one union member (R. 19). That ended the first phase of the case.

The second phase of this case started Tuesday afternoon, May 31, 1960, in chambers, when the court, the petitioner and counsel for the employer discussed procedure to be followed in contempt proceedings involving the pickets. First the petitioner told the court (R. 53) that he had a motion to vacate the temporary injunction prepared and would file it immediately if he could obtain an early hearing. The court not only flatly refused but declared

that it would be impossible to obtain a hearing within the week. Then the following arrangement was entered into:

> "Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings.
>
> "* * * I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter. So far as I was concerned, the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings."

The next day, June 1st, the petitioner produced the four men in court as agreed, and after stipulating picketing had continued (R. 23) the petitioner went on to advise the court as follows:

> "I don't think any discussion would be fruitful except to show that this matter has been brought to the attention of the National Labor Relations Board; an unfair labor practice charge has been filed against the employers for failing to bargain faithfully; that matter has been docketed in Cleveland, No. D-C-A 2168; as we had indicated before, in our discussion before * * *, we felt that when an order is made by a court which lacks jurisdiction over the subject matter of the action; it could not be a valid order, therefore, no process for contempt can issue in the face of its invalidity. We charge that this Court does not have jurisdiction by virtue of the fact that the National Labor Relations

Act has been amended, and, since 1947, reposes the entire jurisdiction over this matter in the National Labor Relations Board, that this clause of a collective contract which has been violated, if we take the statements of the employer as correct, has been violated by the picketing and this picketing ensued without the necessary notification being given * * *."

Ignoring the fact that the procedure they had just been through was one agreed upon in the court's chambers the day before, the court then demanded to know of the men in court why they had violated the order of the court or whether they were told by someone to do that. During the course of the questioning of the men by the court, the petitioner spoke up and said, "I can advise the court now that they were told by me." The petitioner then went on to explain that after the ex parte injunction was issued and the court had again and again refused to grant or set a time for hearing on the question of jurisdiction, he had explained the entire situation to the union's counsel in Chicago.

After this explanation the court wanted to know whether the men acted on their own initiative or whether someone told them to disobey the order of the court. The following from the record, at page 30, answered that question:

"Mr. Green: I have said, I have already said to the court that they obviously did not act on their own initiative.

The Court: Who did?

Mr. Green: *Well, they were—*

The Court: Who did?

Mr. Green: *—instructed to do so by their superiors in the union* in this case according to their own agreement, after they were advised by counsel that the order was not—

The Court: That is a contempt of court."

In concluding the June 1 hearing the court said (R. 31):

> "They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt."

Whether or not the court had a right to issue the injunction in the first place is one thing, but ordering the men back to work is another, and, we submit, placed the court in the position of using its authority in an effort to break the strike.

The men did not return to work as ordered by the court and did appear in court on Friday, June 3, as directed. The hearing held on that day was somewhat repetitious of the June 1st hearing. The court never did get around to make an order holding the men in contempt so that a writ of habeas corpus could be filed to test the court's jurisdiction.

Instead, the court started to badger and insult the petitioner who tried to explain to the court that inasmuch as the men were involved in a proceeding criminal in nature they were not required to testify against themselves, whereupon the court made this statement.

"You also advised them to violate an order of the court, too," to which the petitioner replied, "I did," obviously meaning that he had advised the union officials in Chicago that the only possible way to get a hearing by this court would be for them to violate the temporary injunction so that the order could be tested in the habeas corpus proceedings.

When the petitioner said that he did advise them, the court announced that the petitioner was in contempt. The petitioner was ordered to appear in court the following Tuesday, June 7. On Monday, June 6, the Judge signed and filed written charges against the petitioner under

authority of, according to the charges filed, Section 2705.02 and 2705.03 of the Revised Code of Ohio (R. 35).

On June 7th the petitioner appeared as directed (R. 37, etc.). At that time the court refused to grant him a hearing or trial, or permit him to testify under oath, saying (R. 55) that he was only there for sentencing. The petitioner's lawyer, over the objection of the court, then read into the record what the petitioner would have said under oath had he been permitted to testify. (Present in the court room to testify on petitioner's behalf were the union's regional counsel from Chicago and local and international union officers.) The record, pages 40, etc., discloses the following took place at the June 7 session of court:

"Mr. Green: Now, may I ask of the court what is conceded to be the posture of this case today?

The Court: He is in contempt of court, I told you.

Mr. Green: Has the court already—let me ask this way—are we—*is my client here only for the purpose of being sentenced for the contempt that the court alleges that was found in him?*

The Court: *That is correct*, Mr. Green.

* * * * *

The Court: *The procedure is he is here in contempt of court. The court must punish him for contempt of court.* I take it that you have consulted the courts on this matter earlier; I take it you have read the Supreme Court decisions on matters of contempt; I know your son didn't. I thought maybe you might.

* * * * *

Mr. Green: *Are we for hearing or trial or what?*

The Court: *You are not here for any hearing or trial.* * * *

Mr. Green: So prior to sentencing, *in view of the fact that the court has already found him in contempt*—

The Court: *That's right—*

Mr. Green: In mitigation, that is all I can say, *I am going to ask the respondent to be sworn, put under oath,* and I think he has that right. And tell for the record under oath exactly what transpired from the very beginning of this case. I think he has that right, Your Honor, and I as counsel believe I have the right to speak on his behalf, or he can himself—and I will repeat exactly what he would testify to you under oath. * * *

Mr. Green: * * * *I am asking the privilege of putting the respondent on the stand—*

The Court: No. The courts have made the pronouncement on that * * * *You are too late for that. You are too late.*

* * * * *

Mr. Green: I understand that *the court is refusing counsel for the respondent and the respondent the right to any mitigation, because you have already found him in contempt?*

The Court: That's right.

Mr. Green: *Without further hearing, without a trial? That you are refusing to let either counsel or the respondent to show or say for the record in mitigation to this court, everything that transpired.*

* * * * *

Mr. Green: You mean to tell me that you are forbidding us to put into the record everything that transpired so that a higher court could determine the fact, whether a lawyer is guilty of contempt of court, whether he acted in a manner that was contemptuous?

The Court: Mr. Green, there is nothing before this court on the theory that you now advance.

Mr. Green: But it has to be before the court, Your Honor.

Mr. Green: This is the record *I want to read into the record what the respondent would testify to if permitted to testify under oath,* * * * *as already*

indicated." (Emphasis ours.) (Proffered testimony begins R. 43.)

Following this (R. 56) the court ordered the petitioner committed to the Lucas County jail for ten days and to pay a fine of $500.00 and stand committed until the fine is paid. Upon the refusal of the court to grant bail, a petition for a writ of habeas corpus was immediately filed in the Court of Appeals of Lucas County, Ohio (R. 1), where, after oral argument, briefs were ordered.

The petitioner was committed to the custody of a bondsman pending final determination. At the Court of Appeals hearing the petitioner was put under oath and it was then stipulated that he would testify as appears in the record (pages 43 through 53). This testimony is unrefuted.

The Court of Appeals, one Judge dissenting, refused to release the petitioner from the custody of the Sheriff. (App. p. 46, *infra.*) On appeal to the Supreme Court of Ohio the judgment of the Court of Appeals was affirmed in a 5 to 2 decision. (App. p. 36, *infra.*)

HOW FEDERAL QUESTIONS PRESENTED.

The question of the state court's jurisdiction was necessarily raised upon the presentation of the petition for injunction to the court in chambers. The court should *then* have determined whether jurisdiction was in the state court or was in the area preempted by reason of the Labor-Management Relations Act.

Immediately following the issuance of the ex parte injunction, the petitioner raised the question of lack of jurisdiction, but in each instance the state court refused consideration of the question.

On June 1st and June 3rd, at the hearings of the union members on contempt of court charges, the state court's jurisdiction was questioned. On June 7th, when the petitioner was ordered into court to answer contempt charges, the court again refused to consider the question of its jurisdiction (R. 40, 41, 55). At that time the court also refused the petitioner a trial, a reasonable opportunity to defend himself, or to testify or be heard in his defense, or to produce or examine witnesses (R. 40, etc.).

The question of the jurisdiction of the state court to issue the initial injunction upon which the contempt citations rested was raised both orally and in briefs filed before the Court of Appeals. The denial of due process of law was also raised orally and in briefs in the Court of Appeals.

The lack of jurisdiction, the denial of due process and equal protection under the Federal Constitution were raised in the Assignment of Errors filed in the Supreme Court of Ohio and were thoroughly discussed in the brief filed by the petitioner to support the Assignment of Errors.

The opinion of the Supreme Court of Ohio shows on its face that these federal questions were considered by that court (App. pp. 30-36, *infra*).

REASONS FOR GRANTING THE WRIT.

Right and Duty of Lawyer to Advise.

This Court condemned the use of contempt to silence a lawyer in the honest discharge of his duty to a client in the case of *In re Watts*, 190 U. S. 1 (1902). The case involved two lawyers who had been convicted of contempt when they mistakenly arrived at the conclusion that the state court of Indiana had jurisdiction superior to the federal district court in a bankruptcy action. In reversing the contempt conviction by the federal district court, Chief Justice Fuller stated at page 28:

> "* * * we decline to entertain the suggestion * * * that members of the bar can be intimidated in the discharge of their duty."

One other statement by Chief Justice Fuller at page 29 in that case brings into focus the sharp conflict between the Ohio courts and this Court on the right of members of the legal profession in good faith to advise their clients:

> "* * * the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that this advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule."

The sharp conflict between the Ohio decisions and the law laid down by this Court is evident from these facts: The advice given by the petitioner here was given after a thorough examination and research of the law. The several citations which appear in this petition provide

ample authority for the procedure adopted and the advice given. The advice was given in good faith and without any attempt to malign or bring the court into disrepute. It was a candid effort on the part of the petitioner to test the jurisdiction of the trial court over the subject matter of a labor dispute affecting interstate commerce after the court left no other course open for the determination of the issue. All parties involved were aware that the procedure adopted by the petitioner was a technical means of obtaining a final and appealable order.

The independence of the bar in the administration of justice is as important before state courts as it is before federal courts, particularly when the state courts are interfering with the administration of federal law.

Due Process Requires a Fair Trial.

In asking this court to grant a writ of certiorari for the reason that the petitioner was denied due process of law in not receiving the rudiments of a fair hearing before a fair tribunal we do not urge any expansion of the outer limits of the concept of civil rights. The peculiar facts of this case add up to disclose a shocking conflict with, and a total failure to respect, the basic rights of this lawyer as a citizen and the rights of the labor organization under the constitution and federal law.

All parties including the Judge who sentenced the petitioner were aware fully a week prior to his conviction of the theory upon which the petitioner proceeded in this case.

The court seized upon isolated statements at the hearings of the union officers, statements torn completely out of context, and during the last of such hearings declared the petitioner was guilty of contempt of court for advising his clients.

When the petitioner appeared before the same Judge on June 7th, 1960, no evidence was introduced respecting the crime with which the petitioner was charged. Only brief statements were made by the court to the effect that the petitioner had advised the defendants to disobey the order of the court and was, therefore, in contempt. Despite the fact that the proceedings constituted criminal contempt the petitioner's counsel was not permitted or afforded the opportunity to inquire into the statements made by the court nor was the petitioner permitted to take the stand in his own behalf or produce other witnesses or evidence. The court instead clearly stated that the only purpose of convening court on the 7th day of June, 1960 was for the purpose of sentencing the petitioner.

The amazing conflict between the conduct of the Ohio trial court and the minimum requirements of due process established by this Court are evident by only a casual reference to three decided cases.

In the case of *In re Oliver*, 333 U. S. 257 (1947), this Court laid down the law that a defendant in indirect contempt proceedings is guaranteed (1) the right to reasonable notice, (2) a right to a trial, (3) a reasonable opportunity to defend himself, (4) the right to testify and be heard in his defense, and (5) the right to examine witnesses.

In an earlier case, *Cooke vs. U. S.*, 267 U. S. 517 (1925), this Court held that even though knowledge of the alleged contempt be acquired from the testimony of others, *or even from the confession of the accused*, those facts would not justify conviction without a trial in which there was an opportunity for defense.

One statement from the *Cooke* case magnifies the denial of due process to the petitioner in this case. At page 537 this Court said:

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if desired, and the right to call witnesses to give testimony relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

In a subsequent case before this Court, *In re Murcheson, et al.*, 349 U. S. 133 (1955), a case arising out of the use of the one-man grand jury system in Michigan, the question before the court was whether a contempt proceeding conducted in accordance with the minimum standards established in *Re Oliver, supra,* "complies with the due process requirement of an impartial tribunal" where the same judge presiding at the contempt hearing had also served as the "one-man grand jury" out of which the contempt charges arose.

At page 136 the court said:

"A fair trial in a fair tribunal is a basic requirement for due process."

At page 137 this:

"Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

The statements attributable to the petitioner by the Ohio courts as justification for the denial of a trial are wholly inaccurate when viewed in the context of the entire record. The honest statements of the petitioner at the June 1st and June 3rd hearings were not contemptuous per se and involve no more than a recitation of facts which had occurred outside the courtroom. The refusal to accord the petitioner an opportunity to explain those statements

and to call witnesses to verify his explanation is, we suggest, in direct conflict with everything established in *Cooke, Oliver* and *Murcheson* as basic elements of due process of law to be accorded to every citizen.

Use of Ex Parte Orders to Circumvent Supremacy Clause.

The procedure adopted by the petitioner to test the jurisdiction of the state court was the product of necessity born of unusual circumstances.

The court, despite assurances given to the petitioner, issued an ex parte temporary injunction ordering all peaceful picketing to cease in a labor dispute affecting interstate commerce. Thereafter the court refused to hold a hearing before the final hearing on the permanent injunction. Convinced that the court did not intend to determine the issue of jurisdiction and firmly convinced that the ex parte order was void and if obeyed would have the immediate effect of destroying the concerted bargaining power of the employees, the petitioner then suggested to the union regional counsel the possibility of obtaining a hearing via habeas corpus.

The procedure agreed upon in chambers on May 31, 1960 was adopted on the conviction that an order issued by a court not having jurisdiction over the subject matter is void and contempt cannot be based on violation of such an order.

The theory of the petitioner was certainly consistent with this court's holding in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America vs. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951) as well as decisions on the same issue by the highest courts of Texas, Michigan, and Indiana.

In each of those cases the court held that the Labor-Management Relations Act had pre-empted the jurisdic-

tion over the subject matter of the action thereby rendering the temporary injunction or restraining order void and in each instance contempt convictions issued by the trial courts for disobedience of the void orders were declared unenforceable. Parenthetically, in none of the cases was there a hint or suggestion that the attorney representing the defendants seeking this means of testing the jurisdiction of the court should be held in contempt for the advice given their clients.

In the United States Supreme Court case last cited, the Wisconsin Employment Relations Board obtained an ex parte restraining order from a State Circuit Court requiring that the petitioners "absolutely desist and refrain from calling a strike, or going out on strike * * * which would cause an interruption of the service of the (Gas Company)" and ordering the petitioners to "take immediate steps to notify all employees called out on strike to resume service forthwith." The State Circuit Court found that the petitioners had not obeyed the restraining order and entered a judgment of contempt.

This court reversed the contempt conviction, holding that the subject matter of the particular dispute had been pre-empted by the enactment of the Labor-Management Relations Act of 1947 and, therefore, the contempt order of the State Circuit Court was unenforceable.

There is absolutely no difference in substance between the procedure adopted by the petitioner in the present case to test the jurisdiction of the Ohio trial court over the subject matter of the dispute and that adopted by the attorneys representing the unions in the Wisconsin case.

The Supreme Court of the State of Texas in the cases of *Ex Parte Dilley,* (1960) 334 S. W. (2d) 425, and *Ex Parte Twedell,* 158 Texas 214 (1958), 309 S. W. (2d) 834; the Supreme Court of Michigan in the case of *Town and*

Country Motors vs. Local 328 I. B. T., 355 Mich. 26 (1959), 94 N. W. (2d) 442 and the Supreme Court of Indiana in *State Ex Rel. Taylor*, (1959) 162 N. E. (2d) 90 have approved the procedure followed by the petitioner. These cases are on all fours with this case.

The Ohio courts by their decisions here sanction the circumvention of the Supremacy Clause of the United States Constitution by holding that every ex parte temporary injunction is a status quo order to preserve existing conditions, relying on the decisions of this Court in *United States vs. Shipp*, 203 U. S. 563 (1906), and *United States vs. United Mine Workers*, 330 U. S. 258 (1947), to reach that conclusion.

A cursory examination of these two cases do not, we submit, support the conclusions reached by the Ohio courts.

In those cases interlocutory orders were issued *in order to preserve conditions then existing*. There was no question that the court in each case did have jurisdiction over the subject matter. Neither case holds or infers that an interlocutory order issued by the court *not having jurisdiction over the subject matter* is valid for any purpose.

Our case did not involve a temporary order to preserve existing conditions by a court having jurisdiction over the subject of the action. The injunction sought and granted was the main relief sought and was not ancillary to the main relief as in *Shipp* and *United Mine Workers*.

In the *Shipp* case this Court had granted a petition to appeal the judgment of the Circuit Court of Appeals in a case involving a death sentence decreed by a Tennessee state court. Pending hearing on the appeal, an order was issued to the state officials to stay the execution. This order was violated. There could be no question that the court had jurisdiction over the subject matter, to-wit: The ap-

peal, and had a right to issue a stay order to preserve existing conditions; the life of the prisoner.

In the *Mine Workers'* case the government had filed an action for declaratory judgment to determine the union's right to unilaterally terminate a labor contract with the Federal Government, operator of the coal mines at that time, and requested a temporary injunction prohibiting a strike. The request for a temporary order was set for hearing by the court. Pending the hearing, a restraining order was issued requiring the Mine Workers not to strike. They struck. Again, there is no question that the district court had jurisdiction over the subject of the action, to-wit: the declaratory judgment, and had a right, pending the hearing of the temporary injunction, to issue an order to preserve existing conditions.

In this case no status quo order was issued because: (1) the court did not intend its injunction to preserve existing conditions until it had an opportunity to determine its jurisdiction,[6] (2) under Ohio law (Sec. 2727.03 R. C.) the court was required to determine its jurisdiction in order to issue a temporary injunction.[7] This is so because the petition prayed for only two things, a temporary injunction and a permanent injunction. The court therefore was required to determine whether the plaintiff was entitled to an injunction—to do so the court was required to determine its jurisdiction at that time. If the court followed the law, then, it determined it had jurisdiction over the subject matter when it issued the temporary

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[6] In discussing the remedies open to the union the Court, at the June 1 hearing, made it clear that a status quo order was not intended. At page 29 of the record the Court said: "You could wait until we had a final hearing on the entire matter; that was the only way you could have done it; * * *"

[7] Section 2727.03 R. C., so far as it relates to this case, provides: "At the beginning of an action, * * * an injunction may be granted * * *, when it appears * * *, that the plaintiff is entitled to injunction.

injunction and (3) the conditions existing at the time when the injunction was issued were a strike and picketing, conditions prohibited not preserved by the ex parte order.

The method used by the Ohio courts to circumvent the Supremacy Clause of the Constitution can open the flood gates upon the entire pre-emption doctrine to seriously interfere with the adoption and preservation of a uniform labor policy unaffected by local rules or prejudices as Congress intended when it created the National Labor Relations Board, reposing exclusive and primary jurisdiction in that board for the purpose of resolving and adjudicating all matters protected and prohibited under Sections 7 and 8 of the act.

Lack of State Court Jurisdiction.

The sanction given by the Ohio courts to the prohibition of all picketing arising out of a labor dispute between an interstate employer and his employees is in direct conflict with *Youngdahl vs. Rainfair, Inc.*, (1957) 355 U. S. 131, where this Court held that though state courts can enjoin violence, intimidation and threats of violence by strikers, they cannot encroach upon the exclusive jurisdiction of the N. L. R. B. by prohibiting all picketing.

The only time a state court may enjoin all picketing, this Court held, is when the violent activity is such as to make further peaceful picketing impossible. There is not, we believe, one word in this record to justify a deviation from the law as pronounced by this Court in *Youngdahl, supra.*

The plaintiff in the initial state court action based its prayer for injunction on the claim that the defendants had breached a no strike clause of the alleged contract by again establishing a picket line at the plaintiff's property; *not on acts of violence or disorder by the pickets.*

The petition filed reveals that there was not one single word alleged claiming mass picketing, threats, intimidations, name calling, blocking of entrances, causing traffic delays or stoppage, or any public disorder of any kind or description.

These Ohio decisions also do violence to the clear pronouncements of lack of state court jurisdiction contained in *San Diego Building Trades Council v. J. S. Garmon*, (1959) 359 U. S. 236 and, of course, other pronouncements by this Court in the development of the pre-emption doctrine starting with *Joseph Garner v. Teamsters, Local 776*, (1953) 346 U. S. 485, and on down through *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 478; *Guss v. Utah Labor Relations Board*, (1957) 353 U. S. 1; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, (1957) 353 U. S. 20; *San Diego Building Trades Council v. J. S. Garmon*, (1957) 353 U. S. 26.

The violence done here to the pre-emption doctrine by the Ohio courts is evident by only casual reference to the second *Garmon* case, 359 U. S. 236.

The opinions in that case make it clear that *the Labor-Management Relations Act has effected a withdrawal of the jurisdiction of the courts of the respective states over any controversy, dispute or conduct which may be said to be arguably protected or prohibited by the Act.*

Two other aspects of the pre-emption doctrine which are particularly applicable to the original injunction action here to prohibit picketing are clearly within the principles stated in the second *Garmon* case, *supra*; principles completely ignored by the Ohio courts. They are:

First, it is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has jurisdiction to determine the issues involved.

Second, the state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined are *arguably or potentially* within the jurisdiction of the National Labor Relations Board, deferring to that tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt must be resolved in favor of the N. L. R. B. jurisdiction.

These principles are not only enunciated in the second *Garmon* case, 359 U. S. 236, but in decisions of other courts which hold that so long as a dispute between the parties or the conduct sought to be enjoined or regulated is arguably or potentially within the protection or prohibition of the Labor-Management Relations Act, the state court must defer jurisdiction to the National Labor Relations Board regardless of the manner in which the dispute is brought before the court.

Some of these cases are: *Wax v. Mailers Union*, 161 A. (2d) 603 (1960), Penn. Sup. Ct.; *Bert Manufacturing Company v. Local 810, etc.*, 136 N. Y. S. (2d) 805 (1954); *Journeyman, etc. v. Merchee*, 81 Ariz. 162, 302 S. W. (2d) 930 (1956); and *Local 774, I. A. M. v. Cessna Aircraft Co.*, 185 Kan. 183, 141 P. (2d) 989 (1959).

CONCLUSION.

We respectfully suggest that on the basis of the certified record it is clear that the Ohio courts have not only deprived the petitioner of rights guaranteed to him by the Constitution of the United States but their decisions strike at the very heart of the National Labor Policy as estab-

lished by the Labor-Management Relations Act and as interpreted by this and other courts.

In holding that ex parte temporary injunctions are effective to prohibit all picketing in labor disputes involving interstate commerce until the issuing court determines whether it has jurisdiction, the Ohio courts have created a device which will deprive workers of rights granted them under Section 7 of the Act, i.e. concerted activities for the purpose of collective bargaining, and permit acts prohibited by Section 8 thereof.

The facts out of which this case arose clearly illustrate the anti-union weapon forged in these decisions: the ex parte injunction issued solely on information furnished by the employer; refusal or inability of the court to consider its lack of jurisdiction; the effort to force silent submission upon counsel and the union representing the employees; collective bargaining under force of judicial order.

On the basis of all of the foregoing we earnestly believe that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF OHIO SUPREME COURT.

This cause originated in the Court of Appeals for Lucas County upon the filing of a petition in habeas corpus on behalf of Merritt W. Green, II, a Toledo attorney. The petition is grounded on the claim that Green is (constructively) imprisoned and restrained of his liberty in the county jail of Lucas County without legal authority.

Previously, a written charge of contempt of court had been lodged against Green under the provisions of Sections 2705.02 and 2705.03, Revised Code, by a judge of the Court of Common Pleas of Lucas County in a case pending in that court, numbered 188631 and entitled *Toledo Marine Terminals, Inc., v. International Longshoremen's Assn., AFL-CIO, Local 1317-A*, wherein the court granted an order restraining and enjoining the defendants and persons associated with them from committing certain acts involving the picketing of the plaintiff's premises in Toledo and interfering with its business operations. Such charge alleged that Green, legal counsel for defendants, with full knowledge of the restraining order did order and advise the defendants to disobey the same, and that the defendants, acting upon such counsel and advice, did so. Such charge further alleged that Green, after being notified in open court by the judge that he was in contempt of court, did and does continue to advise defendants to continue to disobey such order of the court. Green was then formally and specifically charged with being in contempt of court and a hearing was set for Tuesday morning, June 7, 1960.

Such hearing took place as scheduled, and Green was found guilty, sentenced to serve 10 days in the county jail and fined $500. The present action in habeas corpus followed. Upon the hearing before it, the Court of Appeals

decided, by a two-to-one vote, against Green and found that he was not being unlawfully restrained of his liberty.

An appeal as of right brings the cause here for review.

ZIMMERMAN, *J.* Seeking a reversal of the judgment of the Court of Appeals, Green, hereinafter referred to as appellant, makes three principal contentions: (1) That the Court of Common Pleas in the case instituted in that court was without jurisdiction to issue the restraining order described since the controversy was exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Management Relations Act of 1947 (Section 141 *et seq.*, Title 29, U. S. Code), and hence a contempt proceeding based on any violation by appellant of such restraining order was a nullity; (2) that advice given by appellant to his clients relating to the disobedience of such order was within appellant's rights and duties as an attorney and did not represent contempt of court; and (3) that appellant was denied due process of law in the hearing of the contempt charge against him.

In the original verified petition filed in the Court of Common Pleas, plaintiff, Toledo Marine Terminals, Inc., alleged that at the time of filing the petition no labor dispute existed between it and the defendant association; that a labor contract binding on both plaintiff and defendant association had been signed on May 26, 1960 (effective until April 1, 1961); that on the day of the filing of the petition, viz., May 27, 1960, the defendant association began picketing at the entrance to plaintiff's property in direct violation of such labor contract which provided, *inter alia*, that "there shall be no stoppage of work caused by lockouts, walkout, sit-down, or slow-up of any kind or nature whatsoever, during the term of this agreement"; that the conduct of the defendant association in picketing

plaintiff's premises and calling a strike are illegal acts; that a continuation of the same, unless enjoined, will result in damage to the life and limb of plaintiff's employees and irreparable loss to plaintiff's property; and that such conduct has created a serious emergency of such a nature as to require the issuance forthwith of a temporary restraining order.

In such petition, plaintiff prayed as follows:

> "Wherefore, plaintiff prays that pending final hearing and determination of the issues herein, a restraining order be issued forthwith against the defendants and each of them, their officers, agents, members and other persons associated with and acting in concert with the defendants, and all others to whom knowledge of this order should come, restraining and enjoining them * * *."

Then followed a description of the acts sought to be enjoined in relation to the picketing of plaintiff's premises and other interferences with its operations.

On the same day, viz., May 27, 1960, the court issued the restraining order as prayed for. At a hearing held on June 1 and 3, 1960, on charges of contempt brought against certain of those connected with the defendant association who were alleged to have disobeyed the court's restraining order, and again on June 7, 1960, at the hearing of the charge of contempt against appellant, the evidence established that appellant deliberately advised his clients to disobey the court's restraining order. During the hearing on June 1 and 3 the following took place:

> "The Court: I want to know from them [those charged with contempt] before that can be done [an appeal], give them an opportunity to purge themselves. * * * I want them to explain to me why they violated the order of the court. * * * I want them to

tell me whether they just did that or whether they were told by some one to do that; I want to know.

"Mr. Green [appellant herein]: I can advise the court now that they were told by me.

"* * *

"The Court: * * * The opportunity is always given, of course, to any one who has violated an order of the court, to purge themselves if they choose to do so; so I think they [the ones charged with contempt] should be called upon; well, I don't know whether they are represented by any one or not.

"* * *

"Mr. Green [appellant herein]: They are represented.

"The Court: By an attorney?

"Mr. Green: They haven't taken my license away yet.

"The Court: Well, what do you propose to do?

"Mr. Green: If the court please, assuming they are resting, I propose to rest also, Your Honor. We are really here in a criminal proceeding and my clients are not required to testify in such a general action, they are not required—

"The Court: You also advised them to violate an order of the court, too.

"Mr. Green: I did."

At the contempt hearing on June 7, 1960, Merritt W. Green, appellant's associate in the law practice and one of his attorneys, read from a written statement prepared by appellant and containing the language, "that regardless of the private opinions of the court respecting the validity of the contract that the court had no jurisdiction over this matter and that he was forcing us to advise our clients * * * of their rights not to obey the order."

In its broad sense, a contempt is a disregard of, or disobedience to, the order or command of a public authority, legislative or judicial. In its restricted and more usual

sense, contempt comprehends a despising of the authority, justice or dignity of a court; and one is guilty of contempt whose conduct is such as tends to bring the administration of the law into disrespect and disregard or otherwise tends to impede, embarrass or obstruct the court in the performance of its functions. 11 *Ohio Jurisprudence* (2d), 90, Section 2; 12 *American Jurisprudence*, 389, Section 2.

This statement is applicable with particular force to an attorney at law. An individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void. But does not an attorney stand in a somewhat different position? He is an officer and arm of the court and as such has a duty to recognize and uphold the orders of the court as long as such orders stand. Consequently, an attorney who brashly advises his client to disobey an existing court order is in contempt of court notwithstanding any vulnerability that may attach to such order.

But aside from such observations, on its face the petition filed in the Court of Common Pleas by the Toledo Marine Terminals, Inc., against the International Longshoremen's Association and others, does not disclose that the court lacked jurisdiction to entertain the same. The restraining order issued on the petition was preliminary and temporary in nature and *no motion was filed to dissolve it nor was any other instrument interposed challenging the court's jurisdiction.* Usually and in the first instance, a court of general jurisdiction, such as the Court of Common Pleas, is competent to determine its own jurisdiction (14 *Ohio Jurisprudence* [2d], 517, Section 100) and should be accorded fair opportunity to do so. It appears to us that appellant assumed too much too soon in deciding for himself that the court was without jurisdiction and in advising his clients to act on his decision in defiance of the court's order.

It is to be noted that the petition filed in the Court of Common Pleas on which the restraining order was based alleged the imminence of violence in connection with the picketing of plaintiff's premises. Even in labor disputes where the federal labor relations statutes are applicable and exclusive, the Supreme Court of the United States has held that state courts possess the authority to intervene to enjoin mass picketing or picketing accompanied by violence and intimidation. Annotation, 2 L. Ed. (2d), 1636.

The Supreme Court of the United States has also said that a court possesses the power to determine its own jurisdiction, that a temporary restraining order issued by the court must be obeyed regardless of the final jurisdictional determination, and that one who disobeys such an order does so at his peril and may be amenable to criminal proceedings in contempt. *United States v. Shipp*, 203 U. S. 563, 51 L. Ed., 319, 27 S. Ct., 165, 8 Ann. Cas., 265; *United States v. United Mine Workers of America*, 330 U. S., 258, 91 L. Ed., 884, 67 S. Ct., 677.

Or stating it a little differently, affected persons having notice of a restraining order issued on a verified petition or complaint by a court of general jurisdiction must obey the order until it is set aside by orderly judicial process, and deliberate disobedience of such an order while it is in force subjects the violators to contempt proceedings. See *Howatt v. Kansas*, 258 U. S., 181, 189, 66 L. Ed., 550, 559, 42 S. Ct., 277, 280; *Smotherman v. United States* (C. C. A.—10), 186 F. (2d), 676; *In re Lord*, 255 Minn., 370, 377, 97 N. W. (2d), 287, 292; and *Aladdin Industries, Inc., v. Associated Transport, Inc.* (Tenn. App.), 323 S. W. (2d), 222, 228, certiorari denied, 361 U. S., 865, 4 L. Ed. (2d), 104, 80 S. Ct., 117.

We are, therefore, of the opinion that the Court of Common Pleas possessed the authority to cite appellant

for contempt, and that, on proof thereof, punishment was imposable.

There is no denying that appellant possessed the right to advise his clients that in his opinion the Court of Common Pleas was without jurisdiction of the cause and acted beyond its powers in issuing the restraining order, but when he went further and told them to disobey the order, which they did, he laid himself open to the contempt charge.

As to the hearing had on such charge on June 7, 1960, it was not conducted with the decorum and restraint it should have been, but to say it was of such a character as to deny appellant due process of law is hardly justified. The contempt had already occurred as disclosed in the hearing on June 1 and 3, and the judge presiding over that hearing was the same judge who issued the restraining order and who conducted the proceedings on June 7.

We deplore an unfortunate situation of this kind and the acrimony which apparently developed between the judge and the appellant, but we find no sufficient reasons to reverse the judgment of the Court of Appeals. Therefore, that judgment is affirmed.

Judgment affirmed.

WEYGANDT, C. J., MATTHIAS, RADCLIFF and O'NEILL, JJ., concur.

TAFT and BELL, JJ., dissent.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of HERBERT, J.

BELL, J., dissenting. I am in complete agreement with the statements in the majority opinion as to what constitutes contempt of court, and I certainly concur in the observation that the acrimony which developed between the judge and the attorney was unfortunate. A tendency toward an apologetic attitude on the part of both might well have avoided the unfortunate circumstances which resulted in this litigation.

But my interpretation of certain portions of the record herein forces me to a conclusion different from that of the majority of the court. In my opinion there is a sufficient basis in the holdings of this Court to justify the opinion of the attorney that the Common Pleas Court had no jurisdiction of the subject matter. *Grimes & Hauer, Inc., v. Pollock,* 163 Ohio St., 372; *Richman Brothers Co. v. Amalgamated Clothing Workers of America,* 168 Ohio St., 560. Convinced that he had, at least, an arguable issue on the question of the validity of the restraining order, it was his duty as a lawyer to so advise his clients.

The record indicates that, on the day *prior* to the first contempt hearing (the hearing at which the attorney and his clients were found guilty of contempt although no citation in contempt had then been issued for the attorney), the attorney, *at the suggestion of his opposing counsel and with the full knowledge of the court,* agreed to submit to the court his clients to be dealt with on contempt. A that time he stated that he "would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings."

To subsequently hold him in contempt for actually doing what, with the knowledge of the court and opposing counsel, he had agreed to do appears to me to be carrying

the processes of contempt to an end that is unwarranted in this situation.

Judge Younger, in his dissenting opinion in the Court of Appeals, summed it up thus:

> "In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of court and advises or aids and abets his client in disobeying it and the actions of an attorney who has valid legal grounds for believing the order of the court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the court know what is being done and the reason for it. I would not condone the one and I can not condemn the other."

TAFT, J., concurs in the foregoing dissenting opinion.

APPENDIX B.

OPINION OF THE OHIO COURT OF APPEALS.

PER CURIAM:

This is an original action in habeas corpus filed in this Court on June 7th, 1960. The issuance of the writ of habeas corpus is the outgrowth of an action for an injunction had in a case then pending in the Court of Common Pleas of Lucas County, wherein the Toledo Marine Terminals, Inc., was plaintiff, and various members of the International Longshoremen's Association, a labor organization, were defendants. The record discloses the following pertinent facts in the above styled action: an injunction was sought to enjoin the defendants, among other things, from picketing in any manner the premises of the plaintiff as set forth in the petition. Upon the filing of this petition a temporary restraining order was allowed by the Court as prayed for and bond was set and furnished. In defiance of this restraining order defendants continued with the picketing of plaintiff's premises. As a result of such violation of the restraining order four members of the Longshoremen's Association were cited for contempt of court. A hearing on said contempt charges was held before the Honorable John M. McCabe, Judge of the Court of Common Pleas on June 1st and June 3rd, 1960. The petitioner seeking release by habeas corpus is an attorney at law and appeared as the attorney for the Longshoremen Association in the action out of which the present action grows; that he also appeared as attorney for the four pickets charged with contempt of court at the hearing on June 1st and June 3rd. At this hearing the petitioner in this habeas corpus action was asked—

"The Court: I want them to explain to me why they violated the order of this Court.

Mr. Green: I can—.

The Court: I want them to tell me whether they just did that or whether they were told by someone to do that, I want to know.

Mr. Green: I can advise the Court now that they were told by me."

Upon his admission that he had advised members of the union to continue the picketing of plaintiff's premises in violation of the Court's restraining order the Court found Mr. Green was in contempt of court and he was given until the following Tuesday, June 7th, to purge himself of contempt.

On June 6th the Court filed a written charge against the respondent charging him with contempt of court and set the hearing on said charge for June 7th at 10:30 a.m. At this hearing the respondent appeared, also his counsel, Mr. Merritt W. Green and Mr. Robert Burns, who stated that they were in court pursuant to the order issued to the respondent to appear with counsel to purge himself of contempt of court. Counsel thereupon stated to the court that they were taking the position that the court was without jurisdiction of the subject matter, in the action in which the restraining order was issued. During the hearing on June 7th counsel admitted that the respondent advised the members of the union to violate the restraining order issued by the court. See Record, page 43.

Three legal questions are presented:

First: Did the Court have jurisdiction to issue the restraining order which is the basis of this contempt action?

Second: Did the action of the respondent in advising the violation of the restraining order constitute a contempt of court?

Third: In the hearing upon the written charge against the respondent for contempt of court was due process of law accorded the respondent?

It is the contention of the petitioner that the Common Pleas Court did not have jurisdiction of the subject matter in the original action to issue the restraining order or restrain the picketing of the plaintiff's property, that the subject matter involved was within the exclusive jurisdiction of the National Labor Relations Board. The right of the state Court in the original action to retain jurisdiction and on final hearing to issue an injunction is not raised by this proceeding, and is not decided by the Court. The question involved in this habeas corpus action is the jurisdiction of the state Court to issue the temporary restraining order to preserve existing conditions until such time as the Court could pass upon the question of its jurisdiction. We believe that this question is fully and definitely settled by the decisions of the United States Supreme Court.

In the case of *United States of America v. John F. Shipp, et al.*, 203 U. S. 563, 27 Supreme Court Reporter, it is stated on page 166:

> "But even if the circuit court had no jurisdiction to entertain Johnson's petition, and if this Court had no jurisdiction of the appeal, this Court and this Court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument, and to take the time required for such consideration as it might need. Until its judgment declining jurisdiction should be announced, it had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time."

We find in the first headnote of this case the rule stated as follows:

> "1. Lack of jurisdiction in the Federal circuit court of a petition for habeas corpus, or in the Supreme Court of the appeal from the order denying the writ, does not enable persons to disregard, without liability to process for contempt, the order of the Supreme Court, that 'all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal,' since that court necessarily has jurisdiction to decide whether the case is properly before it."

The rule as laid down in *United States v. Shipp, supra*, is followed in *Carter v. United States*, 135th Federal 2d, 858. In that case the violation of the temporary restraining order was held punishable as criminal contempt pending a decision on the doubtful question of its jurisdiction. The district court was held to have jurisdiction to maintain a status quo by issuing a temporary restraining order and punish a violation of such order as contempt.

The law as stated in the case of *United States v. Shipp, supra*, was followed by the Supreme Court in a case of *United States v. United Mine Workers of America*, 330 U. S., 258. The Court held in the later case that where the district court issued a restraining order to preserve existing conditions pending a decision of its authority to grant injunctive relief in a government suit the defendant's disobedience of the restraining order was punishable as a criminal contempt.

It is the holding of this Court that the Court of Common Pleas had jurisdiction to issue the temporary restraining order restraining picketing of plaintiff's premises.

The second question confronting the Court is whether the act of the petitioner constitutes a criminal contempt. It is recognized that the question here involved is of the

utmost importance to both the Courts and the members of the Bar. *In re Watts*, 190 U. S. 1, 23 Supreme Court Reporter at page 725, Chief Justice Fuller states the rule "in the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the Bar is too vital to the due administration of justice to allow of the application of any other general rule."

It will not be questioned that the petitioner was fully within his rights to advise his clients that in his opinion the Common Pleas Court did not have jurisdiction to issue the restraining order and to point out to his clients the legal remedies open to them to raise the question of jurisdiction. When the petitioner went beyond advising his clients as to their legal rights and that the order of the Common Pleas Court in his opinion was invalid and advised them to violate the Court's order, his actions in so advising them ceased to be privileged and he acted at his peril. The act of advising the violation of the Court's order in and of itself constitutes contempt regardless of the good faith or bad faith of the petitioner. The record reveals that the petitioner admitted in open Court that he advised his clients to violate the Court's restraining order. The gist of petitioner's offense was not in advising his clients that the Court was without jurisdiction to issue the restraining order and therefore the order was invalid, but when he proceeds further and without filing any motion or pleading of any kind to test the jurisdiction of the Court advising his clients to ignore the Court's order. This is not a case where the attorney gives wrong advice on a legal proposition. Whether his opinion regarding the Court's jurisdiction was correct or incorrect his duty was to advise his

clients to obey the order and to follow his legal remedies to test such jurisdiction.

In the instant case the conduct of the petitioner was clearly an obstruction to the due administration of justice and therefore the question of his good faith in advising a violation of the restraining order has no application.

The final question to be passed upon by the Court, is whether or not at the hearing on the written charges filed against the petitioner he was denied due process of law. Before discussing the question involved let it be said that this Court does not approve of the manner in which the hearing in the trial court was had. The wrangling appearing in the record which took place between counsel for the petitioner and the court should not be found in an orderly judicial proceeding. However, the duty of this Court is to sift the evidence appearing in the record to see if due process had been afforded the petitioner and to determine whether any rights of the petitioner have been violated to his prejudice. In both the decisions of the United States Supreme Court and the Supreme Court of Ohio it is stated that due process of law involves only the essential rights of notice, hearing or the opportunity to be heard before a competent tribunal. *McKane v. Durstoon*, 153 U. S. 684, 14 Supreme Court Reporter 913, *State v. Edwards*, 157 O. S., 175, *Luff v. State*, 117 O. S., 102.

R. C. Sec. 2705.01 provides that a Court or Judge at chambers may summarily punish a person guilty of misconduct in the presence of or so near the Court or Judge as to obstruct the administration of justice.

It would appear that when the petitioner, an officer of the Court, stated in open Court on June 1st and June 3rd that he advised the pickets to continue their picketing and disobey the restraining order his acts constituted contempt, "in the presence of or so near the Court as to

obstruct the administration of justice." Under such facts it was not necessary to file written charges. However, whether necessary or not, written charges were filed under R. C. Sec. 2705.03 for contempt of court as set forth in sub-section A of R. C. Sec. 2705.02 and a hearing was had on said written charges on June 7th.

The trial court before whom the contempt proceedings was had was also the trial Judge who issued the temporary restraining order which was violated and also the trial court conducting the hearing on June 1st and June 3rd of the pickets charged with contempt. This being true, in the hearing held on June 7th the Judge could take judicial notice of all that transpired in the preceding hearings which were the outgrowth of the injunction action then pending before him. In the hearing on June 7th the court could take judicial notice of the fact that the temporary restraining order restraining picketing was issued; that the restraining order so issued was violated by the continuing of picketing after the restraining order was issued and after those violating the order had notice of the order; that the petitioner as attorney for the respondent at the hearing on June 1st and June 3rd admitted advising them to violate the restraining order.

While there appears in the record contradictory statements of the purpose of the hearing had on June 7th and at times it would appear that the court and counsel were apparently confused and differed as to the matters being discussed, this Court is of the opinion that there appears in the record admissions of guilt of the petitioner in advising his clients to violate the restraining order. This admission of guilt was made by the petitioner at the hearing on June 1st and June 3rd and admission of his guilt in advising the violating of the restraining order was made by his counsel at the hearing on June 7th. The record

does not show the petitioner was denied the opportunity to be sworn and to testify; that his counsel read into the record a complete and detailed statement of what the petitioner would testify to if sworn and testified as a witness. Various parts of this statement made by petitioner's counsel were discussed during the presentation by both petitioner's counsel and the court. The Court find that the petitioner was not denied due process of law at the hearing on June 7th and that there was evidence produced at the hearing of June 1st and June 3rd and also June 7th which supported the finding of the trial court that the petitioner was guilty of contempt of court. Consideration of the evidence produced prior to the filing of written charges was within the sound discretion of the trial court and was not prejudicial to the petitioner. See *North American vs. United Automobile, etc.*, 69 O. L. A. 242, 124 N. E. (2nd) 822.

The Court therefore find that the petitioner has failed in his proof that he is being unlawfully restrained of his liberty. Judgment accordingly.

MIDDLETON, J. and GUERNSEY, J. concur.

YOUNGER, *J. J.* dissents.

It is admitted by all parties here that the plaintiff in the case in which this contempt proceeding arises, The Toledo Marine Terminal, Inc., is engaged in interstate commerce and that the picketing by the defendant members of the International Longshoremen's Association was entirely peaceful and nonviolent.

The Supreme Court of Ohio in *Grimes & Hauer vs. Pollock*, 163 O. S. 372, has held:—

> "Because of the decision of the Supreme Court of the United States in the case of Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U. S., 485, where a labor union is in dispute with an employer engaged in interstate commerce over the unionization of the employer's nonunion employees, and the union pickets the business locations of such employer in an orderly and peaceful manner, a state court is without jurisdiction to enjoin the picketing; a controversy of this kind comes within the provisions of the Labor Management Relations Act (Section 151 et seq., Title 29, U. S. Code), as it relates to unfair labor practices; and the employer must, initially at least, pursue the remedy of presenting his grievance to the National Labor Relations Board."

Also in *Richmond Brothers Co. vs. Amalgamated Clothing Workers of America, et al.*, 168 O. S. 560, the Supreme Court held:—

> "Where interstate commerce is involved and a labor union, through its members who are not former or present employees of an employer, engages in nonviolent picketing of such employer's premises to induce the unionization of his employees, the National Labor Relations Act (Section 141 et seq., Title 29, U. S. Code, as amended) has exclusive application, and, by decisions of the Supreme Court of the United States interpreting such act, state courts lack the power and jurisdiction to intervene."

The Court of Appeals of Lucas County in December, 1959, in *Sherlock Baking Company vs. Bakery Drivers Union Local* (unreported) held to the same effect.

In view of the above cases and the decisions of the Supreme Court of the United States upon which they are based, the petitioner, Merritt W. Green II, had a valid legal foundation for his opinion that the Common Pleas Court had no jurisdiction of the subject matter and had a valid arguable issue on the question as to whether or not the restraining order involved herein was void. It was his duty as a lawyer therefore, in my opinion, to so advise the head of the Longshoremen's Union in Chicago and its general counsel in Chicago and such of the individual defendants as might ask him concerning the same.

The record in this matter from its beginning to its end is such that neither the petitioner, his attorneys, nor the trial court have any reason to be proud. It shows a developing clash of personalities, much argument over unimportant or irrelevant matters, a complete forgetting of the main issue and a run away on a tangent. However, there is practically no controversy or dispute over the main facts, and no denial at all over what I consider to be the controlling facts.

As I read this record the decision of the union to continue picketing was made by the top officials and general counsel in Chicago. At page 35 of the June 7th hearing Mr. Green stated as follows:

> "At about 8:00 P. M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had concluded that on the basis of my report to them that their only possible course was to continue the picketing. I thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets."

However it is true that at the hearing before Judge McCabe, in the midst of an exciting hearing and considerable confusion, and in an effort to get down to the business at hand—that of dealing with the contempt of the four pickets which he had voluntarily brought into court—Mr. Green did, big-heartedly and, in my opinion, contrary to the record, assume such responsibility.

The acceptance of this responsibility was a direct result of a conference and a firm agreement reached in Judge McCabe's office on May 31st between Mr. Green, Mr. Ragan (the opposing counsel) and Judge McCabe, as set forth by the following on pages 37-39 of the June 7th hearing and which is not denied:

> "Mr. Ragan opened the discussion and he and the Judge talked for some time during which conversation the court concluded that it did not intend to reform the contract. Feeling it necessary to advise the court of my position on the jurisdictional matter involved I interrupted the conversation and asked if I could say a few words, a request Judge McCabe graciously granted. I attempted to explain the matter to him pointing out that I was there only to object to the jurisdiction of the court and that my prime interest was to have the matter heard so that we could either appeal it to get it before the N. L. R. B. or get it where it belonged. Judge McCabe suggested that I was obsessed with this point and Mr. Ragan suggested that I file a motion to vacate the restraining order.
>
> The Court: "That's right.
>
> Mr. Green: "I thereupon told the Court that I had a motion to vacate prepared and would gladly file it immediately if I could obtain an early hearing. The court flatly refused saying that he would not hear the motion until the restraining order was obeyed. I

then asked Judge McCabe that if the restraining order was obeyed would it be possible to obtain a hearing within the week and he replied that it would not.

"Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings. (Emphasis added.)

"The entire atmosphere of the meeting was light and agreeable and I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter. So far as I was concerned the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings."

The following day, June 1st, all of the above parties appeared in court as agreed upon and the petitioner was accompanied by the four pickets he had agreed to produce. However, the hearing deteriorated into a wrangle as to the court's jurisdiction to issue the restraining order, the propriety of the court's refusal to grant a hearing to the defendants either before or after issuing the order, the failure to file a motion to dissolve the restraining order and many other matters, notwithstanding the business at hand was the alleged contempt of the four defendants as agreed upon the day before.

The record does show however that at one point Mr. Green addressed the court as follows:

"Mr. Green: You are sure you could not cite them for contempt now, Your Honor? The only thing I want here is that these parties may be thrown in jail and get them out on habeas corpus?"

An adjournment was taken to Friday, June 3rd, when evidence was submitted showing that the picketing was still continuing but no finding was made as to the guilt or innocence of the four defendants. In fact they were completely forgotten and the petitioner as their attorney was then charged with contempt and the matter adjourned to June 7th.

It was never established by any evidence whether the four pickets acted upon the advice of the petitioner Mr. Green, the top officials of the union in Chicago, the general counsel in Chicago, or any one else.

The real reason why these four defendants were not sentenced and sent to jail so that the whole thing could be tested by habeas corpus as agreed upon the day before remains, to me, a mystery.

In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of Court and advises or aids and abets his client in disobeying it and the actions of an attorney who has valid legal ground for believeing the order of the Court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the Court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the Court know what is being done and the reason for it. I would not condone the one and I can not condemn the other.

I can not conscientiously vote to find the petitioner guilty of contempt under these circumstances and I therefore dissent.

APPENDIX C.

JUDGMENT OF THE SUPREME COURT OF OHIO.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $_____.

ORDERED, That a special mandate be sent to the Court of Appeals of Lucas County, to carry this Judgment into Execution.

APPENDIX D.

REVISED CODE OF OHIO.

Sec. 2705.02 *Acts in contempt of court*:

"A person guilty of any of the following acts may be punished as for a contempt:

"(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;"

* * *

* * *

Sec. 2705.03 *Hearing*:

"In cases under Section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. This section does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings."

Sec. 2705.05 *Trial*:

"Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear any answer or testimony which the accused makes or offers.

"The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than Five Hundred Dollars or imprisoned not more than ten days, or both."

Sec. 2727.03 *Courts authorized to grant injunctions*:

"At the beginning of an action, or any time before judgment, an injunction may be granted by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county, or the probate

court in causes pending therein, when it appears to the court or judge by affidavit of the plaintiff, or his agent, that the plaintiff is entitled to an injunction."

* * *

Sec. 2727.06 *Notice of application*:

"If, in the opinion of the court or judge, the defendant or a party to the suit should be heard before granting an injunction, a reasonable notice may be required to be given to such party of the time, place, and purpose of the application for the injunction. Such party in the meantime may be restrained."

* * *